REMARKS

This paper is responsive to a non-final Office Action mailed Jan. 4, 2005. Prior to this response, claims 1-38 were pending. No amendments or cancellations have been made. Claims 1-38 remain pending.

A. Provisional Rejection of Claims 1, 3 and 7 Under the Judicially Created Doctrine of Obviousness-Type Double Patenting

The Examiner has provisionally rejected claims 1, 3 and 7 under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1, 3 and 7 of U.S. Patent Appl. No. 09/969,305. Applicant respectfully disagrees and asserts that claims 1, 3 and 7 are not unpatentable over claims 1, 3 and 7 of U.S. Pat. Appl. No. 09/969,305 under the judicially created doctrine of obviousness-type double patenting. However, to expedite prosecution, Applicant submits a disclaimer of the portion of the term of the present patent application (when issued as a patent) that exceeds the term of U.S. Pat. Appl. No. 09/969,305 (when issued as a patent). The disclaimer is attached as Exhibit B.

B. Claims Rejected Under 35 U.S.C. § 103(a)

The Office Action rejects claim 1 as being unpatentable under 35 U.S.C. § 103(a) over U.S. Pat. No. 6,493,871 to Thomas McGuire et al (hereinafter "McGuire"), in view of U.S. Pat. No. 6,023,620 to Lars Hansson (hereinafter "Hansson"). The applicant traverses this rejection as follows.

McGuire is a non-analogous art and is therefore impermissible prior art under 35 U.S.C. § 103(a). Wang Laboratories, Inc. v. Toshiba Corp., 993 F.2d 858, 26 U.S.P.Q.2d 1767 (Fed. Cir. 1993) states that a reference must be in the same field of endeavor or reasonably pertinent to the problem being solved by the inventor in order to be considered as prior art. The fact pattern in Wang was similar to the present fact pattern. See also, MPEP § 2141.01(a), section "Analogy in the Electrical Arts". In Wang the Federal Circuit addressed the question of whether a reference using memory

modules in large industrial computers could be used to render obvious claims that claimed similar memory modules in personal computers.

Similarly, the present question is whether a reference describing software updating methods and systems for personal computers can be used to render obvious software updating methods and systems for cellular telephones and other portable wireless communication devices. The answer is no, for the following reasons.

First, the reference itself (McGuire) states that the methods of McGuire could be applied to other devices:

> Although not required, the invention will be described in the general context of computer-executable instructions, such as program modules, being executed by a personal computer. Generally, program modules include routines, programs objects, components, data structures, etc. that perform particular tasks or implement particular abstract data types. Moreover, those skilled in the art will appreciate that the invention may be practiced with other computer system configurations, including hand-held devices, multi-processor systems, microprocessor based or programmable consumer electronics, network PCs, minicomputers, mainframe computers, and the like.

McGuire, col. 5, lines 25 to 36. Thus, McGuire explicitly lists other devices, but none of the other listed devices are communication devices, such as cellular telephones. This conspicuous omission highlights the fact that communications and computing are non-analogous as defined by the Federal Circuit in Wang.

Second, the claimed invention and McGuire are generally dealing with different problems. The specific problems encountered in the wireless communications arts are different from the problems encountered in the personal computer arts. On portable wireless communication devices, there is typically much less memory available, the information receiving bandwidth is much less, and sudden power loss (due to power supply failure) is much more likely.

Importantly, the processing power of portably wireless communication devices is typically more limited than that of personal computers. A large amount of the limited processing power must be devoted to processing communication signals. Much

of the processing power is therefore not available for general processing purposes. Specifically, the processing power that is used for processing communication signals cannot be used to manage the software updating.

The applicant asserts that the invention of claim 1 cannot be rendered obvious by McGuire and Hansson. Accordingly, the applicant requests an allowance of claim 1 and claims 2-18, which depend from claim 1.

Independent claims 19, 20 and 38 have also been rejected under 35 U.S.C. § 103(a) in view of McGuire. As stated above with respect to claim 1, the applicant asserts that McGuire is non-analogous art. Accordingly, the applicant requests an allowance of claims 19, 20 and 38 and further, of claims 21-37, which depend from claim 20.

C. References of Record

The Office Action makes several new references of record. The applicant has reviewed the references made of record and hereby respectfully asserts that the claimed invention is patentably distinct from the references made of record.

D. Conclusion

It is believed that the application is in condition for allowance and reconsideration is earnestly solicited.

Respectfully submitted,

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